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JAMES R. BROWNING

No. 524

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN FACTOR (SOMETIMES KNOWN AS JACOB FACTOR)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case, conditioned on the filing and granting of a petition for certiorari in the Ninth Circuit case involving the same taxpayer, entitled *Factor* v. *Commissioner*, 281 F. 2d 100, rehearing denied, July 27, 1960.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, pp. 6–8) is reported at 281 F. 2d 16.

JURISDICTION

The judgment of the Court of Appeals (*infra*, p. 8) was entered on June 16, 1960. By order of the Chief

Justice, dated September 14, 1960, the time for filing a petition for a writ of certiorari was extended to November 13, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Taxpayer's petition to the Tax Court, as amended, alleged, so far as here pertinent, that he was entitled to income tax deductions for "various costs and expenses." As to this item, he made no further specification in any of his pleadings, although it appeared that some costs and expenses had already been allowed by the Commissioner. The question presented is whether, in this context, the Tax Court acted within its discretion in ruling that taxpayer was precluded by his failure to comply with Rule 7 of the Tax Court's Rules of Practice requiring clear and concise pleading of errors attributed to the Commissioner.

RULE INVOLVED

Rules of Practice before the Tax Court of the United States (Revised to November 15, 1952):

> Rule 7.—INITIATION OF A PROCEEDING—PETITION—FILING—FEE—FORM.
>
> * * * * *
>
> (c) *Form of petition.*—
>
> * * * * *
>
> (4) The petition shall contain:
>
> * * * * *
>
> (D) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. * * *
>
> (E) Clear and concise numbered statements

of the facts upon which the petitioner relies as sustaining the assignments of error * * *.

* * * * * *

STATEMENT

For the years 1935, 1936 and 1937, the taxpayer failed to maintain any records of income received by him from two Canadian organizations. (R. 100.)[1] In the absence of taxpayer's records, the Commissioner determined which of the disbursements of the Canadian corporations constituted income to taxpayer, computed the taxes owed by the taxpayer and asserted deficiencies, including penalties for fraud with intent to evade tax. (R. 82–83.)

The taxpayer filed a petition in the Tax Court, contesting the deficiencies. Later, he amended his petition to allege error by the Commissioner in failing to allow him deductions for "various costs and expenses." (Appendix, *infra*, p. 7.) The taxpayer never filed a pleading to specify what costs and expenses he claimed.

The Tax Court determined the amount of taxpayer's deficiencies and that taxpayer was liable for penalties for fraud for each year. (R. 128.) As to taxpayer's claim for "various costs and expenses," in addition to those allowed by the Commissioner, the Tax Court held that the amended petition was "* * * insufficient to present the issues as to deductions now claimed on brief." (R. 112.) The Tax Court held that the pleading failed to comply with Rule 7 of the Rules of Practice of the Tax Court, which required

[1] "R." refers to the three-volume Joint Appendix in the Court of Appeals.

"[c]lear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner * * *." Further, the Tax Court stated that, from the amendment to the petition, it was "impossible" to know the type of costs and expenses claimed or the amounts thereof (R. 111-112); and that the fact that the Commissioner had already allowed "various costs and expenses" served to point up the necessity for a definite pleading if the taxpayer claimed error for failure to allow additional costs and expenses (R. 112).

Taxpayer filed two appeals—one to the Ninth Circuit, involving the years 1935 and 1936, the other to the District of Columbia Circuit, involving the year 1937 (the year in which taxpayer failed to file any return). See Section 7482(b)(1), Internal Revenue Code of 1954. The Ninth Circuit affirmed the Tax Court decision without qualification. The District of Columbia Circuit affirmed the Tax Court decision, except that it remanded the issue relating to "various costs and expenses" with directions to consider any such items as to which proof may be adduced. (Appendix, *infra*, pp. 7, 8.)

DISCUSSION

We are advised that the taxpayer proposes to petition for a writ of certiorari in the Ninth Circuit case. Although there is a conflict between the two decisions as to the proper application of Rule 7 of the Tax Court Rules of Practice to the facts of this case, we believe that the issue lacks sufficient general importance to merit review by this Court. However, if the taxpayer's petition should be granted, it would be appropriate to review the instant case concurrently.

CONCLUSION

It is respectfully requested that the Court withhold action on this petition pending the anticipated filing of taxpayer's petition for certiorari in the Ninth Circuit case.[1] If certiorari is granted in the latter case, it would be appropriate that this petition should also be granted. If, however, certiorari should be denied in that case, the Government—which is filing this anticipatory protective petition solely to safeguard the revenue—requests leave to dismiss it under Rule 60.

Respectfully submitted.

J. LEE RANKIN,
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Attorneys.

NOVEMBER 1960.

[1] If taxpayer does not file a petition within the allotted time, the Government will withdraw this petition under Rule 60.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,884

JOHN FACTOR (SOMETIMES KNOWN AS JACOB FACTOR), PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Decided June 16, 1960

Before FAHY, DANAHER and BASTIAN, *Circuit Judges.*

PER CURIAM: This case is before us on petition for review of a decision of the Tax Court of the United States holding petitioner liable for deficiencies, penalties and taxes for the year 1937. A petition for review of the same decision insofar as it covers the years 1935 and 1936 is pending in the United States Court of Appeals for the Ninth Circuit, petitioner having filed his tax returns for those years with the Collector of Internal Revenue in California. Petitioner did not file any return for the year 1937, so petition for review of that year was filed here. The memorandum decision of the Tax Court is 58,094 P-H Memo. T.C.

The facts are sufficiently set forth in the Tax Court's memorandum decision and it is not necessary that they be repeated here. It is sufficient to state that petitioner's income, in the absence of records, was determined by the Commissioner of Internal Revenue by including therein certain disbursements

of two Canadian organizations solely owned by petitioner, certain remittances, and certain bank deposits. The Tax Court held that petitioner failed to prove that these items were not received by him, or for his benefit, and also failed to prove that they should not have been included in his gross income. The Tax Court also ruled against petitioner on certain other claimed deductions, and further approved fraud penalties assessed against petitioner.

We have examined the record, the testimony, and the rulings of the Tax Court and find that, with the exception hereinafter noted, the Tax Court's findings are not only not clearly erroneous but are clearly correct. In all respects other than the item following, the decision of the Tax Court will be and is affirmed.

We feel, however, that the case must be remanded to the Tax Court for failure to give consideration to various costs and expenses claimed by petitioner in addition to those allowed by the Commissioner. It appears that Paragraph 4 of the original petition in the Tax Court was amended by assigning further errors, including among others the following relating to petitioner's Montray and Gold Underwriters operations:

> "(j) Failure to allow as deductions various costs and expenses in connection with the alleged income considered as received by the Petitioner and referred to in subparagraphs (a) and (d) of the original Petition of the Taxpayer."

The Tax Court held that Rule 7(c)(4)(B)(4) of the Rules of the Tax Court provides that the petition shall contain "clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency." No motion was filed in the Tax Court to require a further and better statement

or bill of particulars, and, at the hearing in that court, no objection was made to the introduction of evidence claimed by petitioner to support the items covered by subparagraph (j) quoted above. We believe that the Commissioner should have considered those items.

The case will be remanded to the Tax Court with directions to consider any such items as to which proof may be adduced. The Government is to have the right to call for a further and better statement, if so advised. We intimate no opinion as to whether or not any of the items are proper offsets against petitioner's income as determined by the Tax Court. The Government has urged that the facts adduced at the hearing before the Tax Court do not establish these items. This, however, is a matter to be considered by the Tax Court and is not to be determined by us in the first instance.

We have examined all of the other grounds urged for reversal and find no error.

The case is remanded to the Tax Court for further proceedings consistent with this opinion.

It is so ordered.

[Caption omitted]

JUDGMENT

This case came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the decision of the Tax Court on review in this case is affirmed in part and reversed in part, and that this case is remanded to the Tax Court for further proceedings consistent with the opinion of this court.

Per Curiam.

Dated: June 16, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960